

DON'T PANIC!!!

What To Do When Subpoenaed

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What is a subpoena?

- ▶ “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:
 - ▶ 1. Attend and give testimony at a deposition, either oral or upon written questions.
 - ▶ 2. Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
 - ▶ 3. Permit inspection of premises under the control of the person.

Wis. Stat. § 887.27(e) (*see also* Fed. R. Civ. P. 45)

- ▶ Part of the formal information gathering process issued to third-party non-participants in lawsuits and criminal matters who have information or documents relevant to the proceeding compelling the provision of information or documents
- ▶ The attorney for the party in the lawsuit generally issues the subpoena without interaction with the court, i.e. no order is issued (generally)

What does a subpoena look like?

How is a subpoena served?

- ▶ Delivery by a person who is at least 18 years old and not a party to the case
 - ▶ Personal delivery
 - ▶ Certified mail
 - ▶ Delivering subpoena at the residence of the person to be served

How long do you have to respond to a subpoena?

- ▶ The subpoena will compel compliance with its terms on or before the date specified, which cannot be less than ten days after service
 - ▶ The subpoenaing party must give the subpoenaed party “reasonable time” to comply
 - ▶ As a practical matter, the compliance date will usually be set at a date and time far enough in the future for the subpoenaed party to effectively respond

Do you have to comply with a subpoena?

- ▶ Yes! But . . .
 - ▶ Subpoenas are not “self-executing”
 - ▶ That means that, while you are compelled by law to comply with the subpoena, there is no automatic mechanism to compel your compliance
 - ▶ In the case of non-compliance, the subpoenaing party must get the court to order directing the subpoenaed party to comply
 - ▶ Continued non-compliance can lead to a contempt of court order, which can have financial and other penalties depending on the nature of the non-compliance and whether a party has a good excuse for non-compliance
 - ▶ Subpoenas can be negotiated
 - ▶ Everything in a subpoena is subject to negotiation – times/dates for compliance, scope of the requests, etc.
 - ▶ Subpoenaing parties are usually accommodating to the subpoenaed party because subpoenas are not self-executing – “voluntary” compliance is always preferred
 - ▶ Subpoenas can be quashed or modified

How do you quash or modify a subpoena?

- ▶ You must file a motion with the court presiding over the matter in which the subpoena was issued asking for a protective order
- ▶ A court can enter a protective order if:
 - ▶ Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is **unreasonable** and **oppressive** or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things designated therein.

Wis. Stat. § 805.07(3)

What is “unreasonable or oppressive”

- ▶ The subpoena can be quashed or modified for the following reasons (among others)
 - ▶ Overbroad
 - ▶ Subpoena seeks indiscriminate inspection of documents/fails to particularize what is being sought (general warrant)
 - ▶ Subpoena seeks irrelevant documents or information
 - ▶ Burdensome
 - ▶ The cost or effort necessary for compliance is unreasonable for the responding party
 - ▶ Confidential/proprietary information
 - ▶ Subpoena seeks information that is confidential, sensitive, proprietary, or may put someone at risk by complying
 - ▶ Improper service
 - ▶ Subpoena was not properly served - however this can be waived if you being complying

What do you do when you're served?

- ▶ DON'T PANIC!!!
 - ▶ The process is intimidating, but you can handle it
- ▶ Carefully read the subpoena to determine what is being sought
 - ▶ Don't volunteer information or produce items that are not being requested
 - ▶ Evaluate whether you actually have any responsive information or documents, and whether those items are subject to any privileges or protections (confidentiality, attorney-client privilege, etc.)
- ▶ Marshall the resources at your disposal
 - ▶ Do you have an attorney in your organization or one you can call upon?
 - ▶ Contact state and national Crime Stoppers
- ▶ Mover quickly!
 - ▶ If you seek help and take action early on, there are more options available

Questions?

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